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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

18 COREPHOTONICS, LTD.,
19 Plaintiff,
20 v.
21 APPLE INC.,
22 Defendant

Case No. 3:17-cv-06457-JD (lead case)
Case No. 5:18-cv-02555-JD

APPLE INC.'S OPPOSITION TO COREPHOTONICS, LTD.'S MOTION FOR LEAVE TO AMEND INFRINGEMENT CONTENTIONS

Date: September 21, 2023
Time: 10:00 AM
Courtroom: 11
Before: Hon. James Donato

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1 **I. INTRODUCTION**

2 The Court should deny Corephotonics's motion because Corephotonics was not diligent.
 3 No court in this district has ever found good cause to amend infringement contentions under
 4 circumstances like those here. Corephotonics waited 11 months to file this motion after the release
 5 of the iPhone 14 series products, including 10 months after it admits it had samples of the products.
 6 Discovery has been open the entire time. Corephotonics's proposed amendment adds literally only
 7 a few words to its contentions, citing only publicly-available information and grouping these
 8 products together with other products under the same high-level infringement theory. (Dkt. 179-2,
 9 179-3.) And Corephotonics is not a resource-strapped startup as it misleadingly suggests. It is
 10 wholly owned by Samsung, acquired for a reported \$155 million, though it refuses to disclose any
 11 discovery about its relevant relationships with Samsung as discussed in Apple's pending motion to
 12 compel discovery. (Dkt. 163.)

13 Rules exist for a reason. There is no way that the diligence required by the Patent Local
 14 Rules and case law precedent can be satisfied by a well-funded Samsung subsidiary delaying 11
 15 months before moving to add new products under the same theory. Corephotonics does not cite
 16 any case granting amended contentions under similar circumstances. Courts in this district
 17 routinely deny motions to amend infringement contentions where the plaintiff delays for several
 18 months or more. There is no basis to reach a different result here.

19 **II. FACTUAL BACKGROUND**

20 This litigation has been pending since November 6, 2017. (Dkt. No. 1.) The case was
 21 stayed on December 14, 2018, and the stay was lifted on April 14, 2022. (Dkt. 100, 127.) On May
 22 6, 2022, Corephotonics moved to amend its infringement contentions to accuse products released
 23 during the stay, and the Court granted that motion on July 25, 2022. (Dkt. 129, 146.)

24 Several weeks later, starting in mid-September 2022, Apple publicly introduced iPhone 14,
 25 iPhone 14 Plus, iPhone 14 Pro, and iPhone 14 Pro Max ("iPhone 14 series"). (Dkt. 179-5 at 2, 4
 26 (Apple noting the product introductions, and Corephotonics acknowledging that the "iPhone 14
 27 series was released around Sept. 16, 2022").)

28 According to Corephotonics's papers, it acquired samples of the iPhone 14 series products

1 weeks later in October 2022 and tested them. (Mot. at 4, Dkt. 179-10 ¶ 2.)

2 But then, seven months passed. Corephotonics said nothing to Apple about these products.
 3 On April 27, 2023—more than seven months after the products were released—Corephotonics sent
 4 an email to Apple stating that it planned to move to amend its contentions, but did not provide a
 5 copy of the proposed amendment or any substantive information about what the amendment might
 6 contain. (Dkt. 179-5 at 4.)¹ The next day, Apple asked Corephotonics to explain its good cause
 7 given that the products had been released long ago starting in September 2022. (*Id.*)

8 Two more weeks passed. On May 12, 2023, Corephotonics responded but did not provide
 9 its proposed amended contentions. (*Id.* at 3-4.) The next business day, Apple responded and asked
 10 Corephotonics to provide a copy of its proposed amendment. (*Id.* at 3.)

11 Eight more weeks passed. On July 5, 2023, Corephotonics finally provided its proposed
 12 amended contentions. (*Id.* at 2.) As Corephotonics admits, the proposed amendment groups
 13 together the iPhone 14 products “under the same infringement theory” as other products and adds
 14 a few words and citations to videos and webpages that were publicly available in September 2022.
 15 (Mot. at 8; Dkt. 179-2,² 179-3.) The amendment also asserts claims 12 and 13 of the ’291 patent,
 16 which Corephotonics canceled in the reexamination of the ’291 patent. (See Dkt. 178-3 at 4, 8-9.)
 17 In response, Apple explained that Corephotonics itself had canceled those claims, and therefore
 18 they may not be asserted, and informed Corephotonics that it opposes the amendment due to lack
 19 of good cause. (Dkt. 179-5 at 1-2.)

20 Two more weeks passed. Corephotonics filed its motion on August 9, 2023. (Dkt. 179.)

21 ¹ Corephotonics incorrectly asserts that its April 27, 2023 email to Apple “sought leave to add the
 22 iPhone 14 series to the case.” (Mot. at 7.) Not so. Corephotonics did not seek leave from the
 23 Court, as required by the Patent Local Rules, until it filed the present motion months later on
 24 August 9, 2023.

25 ² For example, the proposed amended invalidity contentions cite the following videos that
 26 YouTube indicates were posted publicly on September 7, 2023:
 27 - <https://www.youtube.com/watch?v=FT3ODSg1GFE>
 <https://www.youtube.com/watch?v=cgpSBjWutGY>

28 The proposed amended invalidity contentions also cite the following Apple web sites which were
 29 publicly available by September 7, 2022, according to archive.org:
 30 - <https://www.apple.com/iphone-14/specs/> (available on September 7, 2022 as shown at
 https://web.archive.org/web/20220801000000*/https://www.apple.com/iphone-14/specs/)
 - <https://www.apple.com/iphone-14-pro/specs/> (available on September 7, 2022 as shown at
 https://web.archive.org/web/20220801000000*/https://www.apple.com/iphone-14-pro/specs/)

1 **III. LEGAL STANDARDS**

2 “Patent Local Rule 3-6 provides that amendment of either infringement or invalidity
 3 contentions ‘may be made only by order of the Court upon a timely showing of good cause.’” *Aylus*
 4 *Networks, Inc. v. Apple Inc.*, No. C-13-4700 EMC, 2015 WL 12976113, at *1 (N.D. Cal. June 2,
 5 2015). Good cause requires that a party ““acted with diligence in promptly moving to amend” after
 6 a circumstance supporting amendment occurs.” *Id.* (quoting *O2 Micro Int’l Ltd. v. Monolithic*
 7 *Power Sys., Inc.*, 467 F.3d 1355, 1363 (Fed. Cir. 2006)). “The party seeking to amend its
 8 contentions bears the burden of establishing diligence.” *CBS Interactive, Inc. v. Etilize, Inc.*, 257
 9 F.R.D. 195, 201 (N.D. Cal. 2009). The moving party must establish diligence in two ways: “(1)
 10 diligence in discovering the basis for amendment; and (2) diligence in seeking amendment once
 11 the basis for amendment has been discovered.” *Koninklijke Philips N.V. v. Acer Inc.*, No. 18-cv-
 12 01885-HSG, 2019 WL 652868, at *1 (N.D. Cal. Feb. 15, 2019).

13 Diligence is evaluated based on “how quickly the party moves to amend its contentions.”
 14 *Acer, Inc. v. Tech. Props. Ltd.*, No. 5:08-cv-00877 JF/HRL, 2010 WL 3618687, at *3 (N.D. Cal.
 15 Sept. 10, 2010); *O2 Micro*, 467 F.3d at 1367-68 (addressing plaintiff’s “delay in moving to amend
 16 its infringement contentions” and noting that plaintiff “waited almost three months . . . to serve its
 17 proposed amended contentions and two more weeks to formally move to amend”); Pat. L.R. 3-6
 18 (requiring a “timely” showing of good cause).

19 Where the moving party “did not act diligently in moving to amend its infringement
 20 contentions,” there is “no need to consider the question of prejudice.” *O2 Micro*, 467 F.3d at 1368.

21 **IV. COREPHOTONICS FAILS TO ESTABLISH GOOD CAUSE.**

22 This case is not a close call on Corephotonics’s extreme lack of diligence. Courts in this
 23 district routinely find that plaintiffs failed to demonstrate diligence by delaying three or more
 24 months, even where the amendments provide much more new substance than Corephotonics
 25 provides here. *O2 Micro*, 467 F.3d at 1367 (affirming N.D. Cal. district court finding that three
 26 months delay was not diligent); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, No.
 27 C 09-5235 MMC (MEJ), 2013 WL 4604206, at *4 (N.D. Cal. Aug. 28, 2013) (two months delay
 28 was not diligent); *EON Corp. IP Holdings LLC v. Aruba Networks, Inc.* No. 12-cv-01011-JST,

1 2013 WL 6001179, at *2-3 (N.D. Cal. Nov. 12, 2013) (three months delay was not diligent); *Abbott*
 2 *Diabetes Care Inc. v. Roche Diagnostics Corp.*, No. C05-03117 MJJ, 2007 WL 2221029, at *1
 3 (N.D. Cal. July 30, 2007) (five month delay was not diligent); *Trans Video Elecs., Ltd. v. Sony*
 4 *Elecs., Inc.*, 278 F.R.D. 505, 509 (N.D. Cal. 2011) (four month delay was not diligent); *Acer*, 2010
 5 WL 3618687, at *4-5 (no diligence where party did not move for leave until “three months after it
 6 began its review and three weeks after that review was completed”).

7 Nothing in Corephotonics’s motion papers comes anywhere close to establishing the
 8 required showing of diligence. First, Corephotonics misleadingly asserts that it needed to test the
 9 products because “Apple would not give Corephotonics the source code of the iPhone 14 series.”
 10 (Mot. at 7.) As an initial matter, Corephotonics did not ask Apple to provide source code for the
 11 iPhone 14 series. In fact, Corephotonics never said anything to Apple about the iPhone 14 series
 12 for seven months after those products were introduced. After seven months passed, Corephotonics
 13 stated in late April 2023 that it planned to amend its contentions, then delayed another 2.5 months
 14 before providing its proposed amendment. (See Dkt. 179-5.) And even if Corephotonics had asked,
 15 Apple would not have been required to provide source code for a product not at issue in the case.

16 Furthermore, Corephotonics has never cited or relied upon any source code for any product
 17 in its ’291 patent infringement contentions, making its accusation highly disingenuous at best.
 18 Instead, for all accused products it relies solely on publicly available information to provide only
 19 vague and high-level theories based on consumer-level use of the products. (Dkt. 179-2, 179-3.)

20 Next, Corephotonics claims that it performed some undisclosed “difficult and time
 21 intensive” and “extensive and ongoing” testing between October 2022 and April 2023. (Mot. at 7.)
 22 But Corephotonics’s motion papers do not show what testing was allegedly performed or exactly
 23 how much time the testing allegedly took. Setting aside Corephotonics’s unsupported allegations,
 24 the amended contentions themselves provide nothing more than a few additional words to group
 25 the iPhone 14 products with many other accused products under the same high-level infringement
 26 theory based on publicly available information. (Dkt. 179-2, 179-3.) The additions to the
 27 contentions themselves, as shown in redline, could not have reasonably required more than a few
 28 hours. (See *id.*) The amendment itself does not indicate that Corephotonics did anything more than

1 reviewing publicly available product specifications and marketing materials. The amendment
 2 provides no technical test results or any other indication that Corephotonics performed any
 3 laboratory analysis. Corephotonics's claim that it allegedly performed "difficult and time
 4 intensive" testing is not supported by its proposed amendment or by any other evidence.

5 Corephotonics attempts to excuse its delay by citing its choice to encourage its employees
 6 to participate in civil protests in Israel. As an initial matter, that is completely inapposite and cannot
 7 excuse Corephotonics's lack of diligence in this case. Even if the protests had forced Corephotonics
 8 to shut down its business for months (which it admits they did not), in any event Corephotonics's
 9 multiple technical expert consultants based in the U.S., who have performed extensive other work
 10 supporting its litigation against Apple, could have performed testing to develop amended
 11 contentions along with Corephotonics's U.S.-based counsel. Corephotonics's counsel also could
 12 have reached out to notify Apple in October 2022 or any time thereafter to explain that
 13 Corephotonics was considering accusing these products of infringement but was impeded by civil
 14 unrest. Corephotonics's counsel and outside experts did none of that, and its present motion does
 15 not claim otherwise. Instead, Corephotonics delayed through more than seven months of silence.

16 Regardless, even if the preparation of the proposed amendment somehow required the
 17 involvement of Corephotonics employees in Israel (which it did not, as explained above),
 18 Corephotonics's purported excuse still would be unavailing because Corephotonics does not allege
 19 that the civil protests shut down its business for the 11 months that it delayed. To the contrary, its
 20 declarant admits that Corephotonics simply chose to prioritize other work (Dkt. 179-10 ¶ 3) instead
 21 of diligently prosecuting this lawsuit that Corephotonics chose to file and affirmatively moved to
 22 un-stay last year. (Dkt. 120.)

23 This case is a far cry from and bears no resemblance to the *Internap* case Corephotonics
 24 cites. (Mot. at 2, citing *Internap Corp. v. Noction, Inc.*, No. 3:15-cv-03014-JD, Dkt. 74 (N.D. Cal.
 25 Jan. 7, 2016) (Donato, J.).) In that case, after the plaintiff served infringement contentions, the
 26 defendant took issue with the sufficiency of the disclosures. *See Internap Corp. v. Noction, Inc.*,
 27 No. 3:15-cv-03014-JD, Dkt. 64 at 2 (N.D. Cal. Nov. 24, 2015). Twelve days later, the plaintiff
 28 served supplemental contentions to address the defendant's complaints and promptly filed a motion

1 to amend; the defendant did not dispute that the amendment resolved its complaints, but it
 2 nevertheless opposed the amendment and filed a motion to strike the amendment. *See id.* at 2-3.
 3 The Court permitted the amendment and commented on the “basic failure of professional civility
 4 and courtesy” in the defendant’s conduct, as the Patent Local Rules “are not an iron cage” and they
 5 “afford some degree of flexibility” for circumstances like that. *Internap Corp. v. Noction, Inc.*, No.
 6 3:15-cv-03014-JD, Dkt. 74.

7 By contrast here, Corephotonics did not serve a corrected disclosure 12 days after
 8 complaints from Apple about insufficiency. Instead, Corephotonics delayed 11 months—seven
 9 months of silence followed by four months before filing its motion—showing more dilatory
 10 conduct than any court in this district has ever found to be sufficiently diligent under the Patent
 11 Local Rules. This is not a matter of “flexibility” in the rules for promptly correcting deficient
 12 disclosures as in *Internap*. This is a matter of respecting the Patent Local Rules and case law
 13 precedent, which would have little meaning if the Court were to find that Corephotonics was
 14 sufficiently diligent here.

15 Corephotonics’s suggestion that it might “file a new lawsuit” on the iPhone 14 products
 16 does not cure its lack of diligence and does not provide good cause under the Patent Local Rules.
 17 (Mot. at 9.) Any such lawsuit should be barred by the doctrine of claim splitting. *See, e.g.*,
 18 *Biogenex Labs., Inc. v. Ventana Med. Sys. Inc.*, C-05-860-JF, 2005 WL 1869342, at *2-3 (N.D.
 19 Cal. Aug. 5, 2005). In any event, because Corephotonics “has not filed separate actions predicated
 20 on its proposed amended infringement contentions, any opinion on the propriety of such theoretical
 21 actions would be premature.” *Acer*, 2010 WL 3618687, at *5.

22 Finally, because Corephotonics “did not act diligently in moving to amend its infringement
 23 contentions,” there is “no need to consider the question of prejudice.” *O2 Micro*, 467 F.3d at 1368;
 24 *Word to Info Inc. v. Facebook Inc.*, No. 15-cv-03485-WHO, 2016 WL 6276956, at *6 (N.D. Cal.
 25 Oct. 27, 2016) (denying motion to amend contentions due to lack of diligence without consideration
 26 of prejudice); *Looksmart Grp., Inc. v. Microsoft Corp.*, No. 17-cv-04709-JST, 2019 WL 462987,
 27 at *3 (N.D. Cal. Feb. 6, 2019) (same).

28

1 **V. CONCLUSION**

2 For the foregoing reasons, Apple requests that the Court deny Corephotonics's Motion.

3

4 Dated: August 23, 2023

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CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served on August 23, 2023, with a copy of this document via the Court's CM/ECF systems per Local Rule CV-5(a)(3). Any other counsel will be served by electronic mail, facsimile, overnight delivery and/or First Class Mail on this date.

/s/ Heidi L. Keefe

Heidi L. Keefe